Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF BELLSOUTH CORPORATION

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BellSouth Corporation, for itself and its affiliated companies (collectively "BellSouth"), submits the following comments in response to the Notice of Proposed Rulemaking ("*Notice*") released in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

"One of the fundamental goals of the Telecommunications Act of 1996 (the 1996 Act) is to promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, in order to stimulate competition for all services, including advanced services."[2] This goal has been achieved for high-volume business users, who can select among several competing providers to fulfill their broadband telecommunications requirements. For low-volume users -- residential consumers, small and rural businesses, schools, libraries and rural health care providers -- the deployment of advanced services is occurring at a slower pace. The goal of this proceeding (and of the related *Notice of Inquiry*

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1 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Dkt. No. 98-147, FCC 98-188 (rel. Aug. 7, 1998) ("*Order*" or "*Notice*," as applicable), *recon. pending*.

2 *Id.* at ¶ 1.

("*NOI*") proceeding)[3] should be to adopt a regulatory framework that will accelerate the deployment of advanced services to these users by removing regulatory constraints that impede investment and dampen competition. Speculation about problems that might arise is not a sufficient basis for regulating the development of the advanced services market, where no firm is dominant and innovation is rampant.

In a market that is characterized by numerous entrants offering advanced services using competing technologies, regulation can only retard the deployment of advanced services. Such deployment requires substantial investment and risk-taking. Technology must be developed; networks must be built or upgraded; service personnel must be trained. Incumbent local exchange carriers ("ILECs"), with their expertise in designing and deploying ubiquitous telecommunications networks and services, are well positioned to make the necessary investments that will enable them to bring advanced services to the broadest segments of the American public, including rural areas. An ILEC's incentive to make those investments will be diminished and the deployment of advanced services will be delayed, however, if unnecessary regulations based on speculative harms limit its ability to respond to competitive market conditions. Only by boldly removing regulatory barriers to *all* potential advanced services providers can the Commission fully encourage the deployment of advanced services to the broadest range of consumers. The Commission must resist the tendency to develop prospective regulatory solutions for abuses that exist only in the crystal balls of ILECs' competitors. The

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3 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Dkt. 98-146, FCC 98-187 (rel. Aug. 7, 1998) ("*NOI*").

emerging market for advanced services demands resolve in clearing away regulatory obstacles to investment.

At its core, the removal of regulatory barriers to ILEC provision of advanced services requires the Commission to adopt reasonable interpretations of the Communications Act of 1934 (the "Act") that avoid speculative, prescriptive intrusion in the advanced services marketplace. Although the Commission has declined to interpret Section 706 of the 1996 Act as an independent grant of forbearance authority,[4] Section 706 nevertheless informs the Commission that it should interpret the Act in a manner that "remove[s] barriers to infrastructure investment."[5] Moreover, where the Commission retains forbearance authority, Section 706 requires that the Commission exercise that authority to provide ILECs with the freedom to compete fully in the competitive advanced services marketplace. By interpreting the Act in view of the guidance provided by Section 706, the Commission can ensure that the emerging mass market for advanced services is not unduly distorted by artificial impediments imposed to address hypothetical market failures.

Regrettably, the proposals in the *Notice* appear to reflect a preference for heavy, speculative regulation of ILECs that seek to provide advanced services. Rather than formulate a procompetitive, deregulatory approach towards ILEC provision of advanced services, the Commission, without any evidence of market failure in the advanced services market, proposes that ILECs provide such services through "truly" separate affiliates to escape their unique

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4 *See Order* at ¶ 69.

5 Pub. L. No. 104-104, title VIII, § 706(b), Feb. 8, 1996, 110 Stat. 153, reproduced at 47 U.S.C. § 157 note.

regulatory burdens.[6] However, the Commission's proposal to import a strict separate affiliate framework into the advanced services setting is unwarranted and counterproductive. The Commission's experience with separate affiliates clearly shows that structural separation generally is detrimental to investment, innovation, and competition, and results in lost efficiencies, increased costs, and reduced services for consumers.[7] In contrast, when separate affiliates are not required, competition has flourished and new and innovative services have been made available to an increasing number of consumers. Accordingly, in this proceeding, the Commission should eschew structural regulation in favor of a straightforward exercise of its authority to interpret the Act in a manner that facilitates ILEC provision of advanced services on an integrated basis. The Commission should refrain from regulation in the absence of compelling evidence of actual market failure.

Specifically, the Commission should not adopt prescriptive unbundling rules for ILECs' advanced services networks. Nothing in the Act requires the Commission to establish a national standard for advanced services unbundling; to the contrary, by enacting Sections 251 and 252, Congress indicated that negotiation and arbitration should be the preferred method by which competitors would obtain access to network elements. Preserving the Section 251-252

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6 *Notice* at ¶¶ 86, 92.

7 The need for Commission action in this proceeding to avoid these effects are not diminished or undercut by the enactment of structural safeguards in Section 272 for BOC provision of interLATA services. *See* 47 U.S.C. § 272. By its terms, Section 272 is merely a transition mechanism, which will expire three years after a BOC obtains interLATA relief under Section 271. Had Congress intended that structural safeguards apply to advanced services, it would have expressly included such services within the carefully crafted list of services that are subject to Section 272. Indeed, rather than rely on Section 272 as a model for an advanced services affiliate, the Commission should expeditiously grant petitions for Section 271 relief so that the Section 272 transition period can commence, as Congress intended.

process is especially important in the advanced services market, where technology is constantly evolving and where standards have not yet developed. The Commission already has established the minimum national standards for unbundling that will guarantee competitors' access to the local loop and other elements of the underlying circuit-switched network. There is no evidence that state commissions are incapable of or are failing to address these issues in arbitration proceedings. Therefore, there is no reason to conclude that the Commission should attempt to prescribe national standards specifically for unbundling advanced services equipment.

The Commission should also reaffirm that an ILEC is not required to provide its advanced services to competitors at a resale discount if the ILEC predominantly markets its advanced services on a wholesale basis. The Section 251(c) resale obligation is expressly limited to telecommunications services offered at retail. Advanced services offered on a wholesale basis thus are excluded from the Section 251(c) resale requirement. Even where an ILEC markets its advanced service to Internet service providers ("ISPs"), the ILEC is offering a wholesale service to the ISP, which the ISP then includes in its retail offer to its customers. The Commission should clarify that in those circumstances, the ILEC is not required to provide its advanced services at an even greater resale discount to other carriers.

This proceeding is also an appropriate one for the Commission to express its commitment to the aggressive exercise of its forbearance authority under Section 10 of the Act.[8] As Commissioner Powell recently stated, "it is deregulation that yields competition," and the Commission must "lead[] by example" through forbearance.[9] To that end, the Commission

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8 47 U.S.C. § 160(d).

9 Commission Michael K. Powell, Remarks Before PCS '98 (Sept. 23, 1998) ("Powell Remarks").

should declare that it will aggressively grant relief from any dominant carrier pricing or tariffing restrictions or requirements applicable to ILEC provision of advanced services whenever Section 10's conditions are satisfied, and *without* arbitrarily imposing a separate affiliate condition. Regardless of the business structure that the ILEC adopts, the Commission has the authority to forbear from pricing and tariffing requirements, as these requirements do not implicate Sections 251(c) or 271.[10] Formation of an advanced services affiliate should not be a precondition to obtaining pricing flexibility in the competitive advanced services market.

Beyond this proceeding, the Commission should be vigilant in identifying and bold in removing other regulatory barriers to competition in advanced services. In particular, this requires prompt approval of Section 271 applications to permit BOCs to offer advanced services on an interLATA basis, as their competitors are already free to do. LATA boundaries were devised over a decade ago to implement divestiture, and they have no logical application to modern-day data networks.

In the *Notice*, the Commission also requested comment on the level of separation that would be required between an ILEC and its affiliate to ensure that the affiliate is not deemed an ILEC. As mentioned, it is neither necessary nor beneficial from a public interest standpoint to impose structural separation regulation on ILECs. Moreover, any decision regarding the level of separation will likely have implications beyond the advanced services context.

Simply put, the Commission should not proceed down that path. Instead, the Commission should remain focused in this proceeding on identifying steps that it can take to facilitate ILEC deployment of advanced services on an *integrated* basis. For the record,

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[10] *See* 47 U.S.C. § 160(d).

however, BellSouth would point out that the separate affiliate framework proposed in the *Notice* is unduly restrictive and, in BellSouth's view, flatly unworkable for the deployment of mass market advanced services. The proposed separation requirements appear to be based on the separation requirements found in Section 272 of the Act.[11] Section 272, however, concerns the unique circumstances of BOC entry into interLATA services. Rather than import Section 272 into a context for which it was not intended, to the extent the Commission creates a separate affiliate framework as an option for carriers who wish to adopt it, the Commission should follow its recent precedents and apply a version of the *Competitive Carrier* separation framework to advanced services affiliates.[12] The *Competitive Carrier* framework would ensure that affiliates enjoy non-ILEC status while providing ILECs and their affiliates with the flexibility to achieve at least some of the efficiencies of integrated operation. Again, however, BellSouth emphasizes that a separate affiliate option cannot and should not be made a surrogate in this proceeding for the efficiencies of integrated operation that can be achieved only through a reasonable, procompetitive interpretation of the Act.

Finally, the Commission should stay focused on the central purpose of this proceeding -- "to promote the deployment of advanced services in a competitive manner."[13] The Commission should not allow this proceeding to become a rehash of the already-completed local competition proceeding that fully and exhaustively addressed local competition concerns. Except for specific issues that directly relate to the provision of advanced services, the

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11 *Id.* § 272.

12 *See infra* note 60.

13 *Notice* at ¶ 4.

collocation and loop unbundling proposals raised in the *Notice* have no place in this proceeding. Current Commission and state commission local competition rules, and the negotiation and arbitration process of Section 252, already provide competitors with access to network elements for the provision of advanced services, consistent with congressional intent in passing the 1996 Act. The Commission should reject proposals to add to those rules in the absence of evidence that state commissions cannot or will not perform their duty under the 1996 Act.

II. OVERVIEW OF THE ADVANCED SERVICES MARKET

A. COMPETITION IN THE ADVANCED SERVICES MARKET

In its comments to the *NOI*, BellSouth explained that advanced services must include all services -- regardless of technology or transmission media and regardless of preexisting regulation classification-- which offer consumers a high level of bandwidth for efficient, interactive voice and data communications.[14] An expansive definition of advanced services is vital because, as the Commission noted, the concept of what constitutes advanced services will evolve as technology evolves.[15] In particular, the Commission should not entertain any preconceived notions that advanced services are limited to "wireline" services.[16] Advanced services provided via satellites or terrestrial wireless systems (or via non-traditional wireline systems such as cable) may well become the norm as the market continues to develop. Accordingly, the framework adopted in this proceeding regarding ILEC provision of advanced

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14 Comments of BellSouth Corporation to the *NOI* ("BellSouth *NOI* Comments") at 8 (filed Sept. 14, 1998), *correction filed*, Sept. 18, 1998.

15 *Notice* at ¶ 3 n.4.

16 *Id.* at ¶ 3.

services should acknowledge and reflect not only the vast array of existing technologies, but also developing technologies.

As BellSouth explained in its *NOI* comments, a high level of competition permeates the advanced services market.[17] Indeed, competition among advanced services providers catering to high-volume business users has fully developed. Large businesses requiring Internet access and data networking capabilities can obtain high-speed dedicated capacity from a variety of telecommunications providers -- including ILECs, competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs") -- or from Very Small Aperture Terminal ("VSAT") or other satellite service providers. Although most residential and small business consumers have not yet received the full benefit of advanced services technology (*i.e.,* they continue to rely on the traditional telephone network), increasing consumer demand fueled by the explosive growth of the Internet has attracted advanced services providers from across industry lines. All of these providers of advanced services possess unique strengths and weaknesses, and attempting to apply a rigid regulatory framework to one type of provider can only dampen the competitive dynamic that is currently driving the deployment of advanced services to the mass market.

The effect that this competitive dynamic is having on innovation and investment in the mass market for advanced services can be readily observed. Cable operators are dedicating substantial resources to transform their one-way video delivery systems into interactive high-speed broadband Internet access networks, capable of downstream transmission rates of 10 to 30 Mbps. And to assure that their customers (both subscribers and information providers) get the

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[17] BellSouth *NOI* Comments at 17-36.

full benefit of that capability, cable operators are investing in nationwide Internet backbone and caching facilities. Cable data services have a headstart in the advanced services market and consequently have many more subscribers than digital subscriber line ("DSL") services. With embedded cable plant passing 97.1 percent of U.S. homes, cable providers are strategically positioned to be powerful competitors in the advanced services market.[18]

Satellite service providers also are responding to the growing demand for Internet access by creating new technologies that provide broadband services directly to residential and small business consumers. Hughes Network Systems, a subsidiary of Hughes Electronics, currently offers Internet access to subscribers in the 48 contiguous states at speeds of up to 400 kbps. Last year, the Commission granted licenses to over a dozen Ka-band satellite systems, most of which have proposed to offer global broadband interactive services. In addition, more than 15 applications are pending for satellite systems proposing to use the 36-51.4 GHz band, which may also be used to provide broadband data services. Once deployed, these satellite service networks have the advantage of instant national ubiquity, which results in their ability to enlist additional subscribers at relatively low marginal costs.[19]

Terrestrial wireless and digital broadcast television systems also figure prominently in the advanced services marketplace. Wireless cable operators have recently obtained regulatory authority to offer two-way services, including high-speed Internet service.[20]

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18 *Id.* at 18-22.

19 *See id.* at 26-28.

20 *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, MM Docket 97-217, FCC 98-231 (1998).

Local multipoint distribution service ("LMDS") operators, with over one gigahertz of bandwidth, are also poised to become significant providers of "wireless local loop" services, including broadband access to the Internet. In addition, the flexibility provided to digital television broadcasting stations to use their allotted 6 MHz channels for non-broadcast services promises to create yet another "pipeline" for high-bandwidth connectivity to the home.[21]

These are just some of the industries responding to consumer demand for broadband services. Significantly, each of the competing advanced services providers described above provides service to residential and small business customers by bypassing in whole or in part the conventional "local loop." Indeed, conventional telephone service is a poor substitute for these alternative high-bandwidth networks, as it currently offers consumers no more than 56 kbps of transmission capacity. Not surprisingly, this consumer demand has also caused telecommunications carriers to develop innovative solutions to conventional local loop limitations. The immediate result is the development of DSL technology, which does not now and is not likely ever to dominate the market. In sum, it is time for the Commission to acknowledge that no firm monopolizes or is likely to be able to dominate the last mile in the provision of advanced services.

B. OVERVIEW OF DSL SERVICE

BellSouth's asymmetrical DSL ("ADSL") technology allows, in addition to the traditional circuit-switched voice channel, continuous upstream data channel at up to 256 kbps and a continuous downstream data channel at up to 1.5 Mbps. Thus, voice signals from a

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[21] *See* 47 C.F.R. § 73.624(b), (c); *Advanced Television Services and their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809 (1997), *on reconsideration*, 13 FCC Rcd 6860 (1998).

subscriber's phone and data signals from the subscriber's computer travel over the same facility between the subscriber's premises and the central office. At the central office, the voice and data channels are separated by a digital subscriber line access multiplexer ("DSLAM") for transmission onto separate circuit-switched and packet-switched networks.

DSL technology allows local telecommunications carriers to compete in the mass market for advanced services.[22] BellSouth conducted a market trial of ADSL service in Birmingham, Alabama in October 1997, and on September 3, 1998, initiated commercial ADSL service in New Orleans. BellSouth plans to roll-out ADSL service in the following major markets this month:

Birmingham
Atlanta
Charlotte
Raleigh
Jacksonville
Fort Lauderdale

BellSouth expects to follow with service deployment in over twenty additional metropolitan areas in its nine-state region in 1999.[23] BellSouth will face competition not only from cable operators, satellite service providers, and wireless cable providers, but also from CLECs that can purchase unbundled local loops and attach their own DSL equipment.

Given the level of competition in the market, the question is not whether ILECs such as BellSouth will deploy this advanced service, but how quickly. ILECs are prepared to

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22 As BellSouth explained in its *NOI* comments, ADSL is not the only type of advanced services offering that ILECs offer. BellSouth, for example, also offers Integrated Services Digital Network ("ISDN"), fiber, frame relay, and ATM services, all of which provide advanced services capabilities. *See* BellSouth *NOI* Comments at 15-17.

23 BellSouth *NOI* Comments at 13-14.

make the necessary investments to deploy advanced services to all Americans, including those in rural areas. If ILECs must form separate affiliates as a precondition to regulatory relief, then ILECs must divert resources from deployment to form an advanced services affiliate. The result of this diversion will be to delay substantially and to curtail further ILEC deployment of advanced services.

The Commission should not underestimate the substantial costs involved in artificially separating advanced services from the underlying circuit-switched network, as the Commission's proposed separate affiliate framework would require. The greatest costs of separation arise from disentangling advanced services from their integration with the systems and other infrastructure of ILECs' operations. Even new services like DSL service are integrated with the existing operational infrastructure. BellSouth already has begun to adapt its existing operational support systems to handle the ordering, provisioning, maintenance, and billing for DSL services and has long had packet services integrated into its operational infrastructure. Besides the cost of having to undo existing integration of each of these systems, the personnel, hardware, software, and floor space required to operate them would have to be duplicated if the DSL service were artificially separated from the existing network. Indeed, an ILEC also would incur substantial legal and transactional costs simply to establish a separate affiliate. In a region as large as BellSouth's, fully implementing an advanced services affiliate could take twelve to twenty-four months and cost hundreds of millions of dollars.

The wasted costs of a separate affiliate are not counterbalanced by a procompetitive benefit. Whether an ILEC provides DSL service through a separate affiliate or on an integrated basis, the Section 251(c) obligations would still apply to the ILEC's underlying local loop elements that competitors would need to provide a competing DSL service. The cost

of purchasing unbundled network elements will be established by negotiation or through arbitration at the state commission and will not vary based on the type of services that the competitor seeks to provide using the element. Thus, competitors' access to local loop elements for the provision of advanced services will continue to exist regardless of whether the ILEC provides advanced service on an integrated or separate basis, or not at all. And as set forth below, mechanisms short of rigid structural separation have proven reliable to protect against potential cost misallocation and discriminatory treatment.

The time and resources that ILECs would waste by creating a separate advanced services affiliate would be better spent maximizing the deployment of advanced services to residential and small business consumers. Accordingly, as explained more fully below, BellSouth urges the Commission to abandon attempts to impose a separate affiliate framework on the competitive advanced services market and focus instead on adopting a procompetitive policy that does not penalize ILECs for providing advanced services on an integrated basis.

III. THE COMMISSION SHOULD NOT RELY ON A SEPARATE AFFILIATE FRAMEWORK AS A METHOD OF FACILITATING ILEC PROVISION OF ADVANCED SERVICES

Much of the *Notice* is dedicated to a discussion of the separate affiliate framework that the Commission proposes as a means for ILECs that seek to provide advanced services to release themselves from their unique regulatory constraints. Without any evidence or analysis suggesting a need for such a framework, the *Notice* manifests such a bias in favor of that framework that it ignores less regulatory solutions. Indeed, the *Notice* clearly signals that ILECs that do not opt for a separate affiliate can expect their integrated provision of advanced services to be subject to "truly" onerous regulatory burdens.

The separate affiliate framework proposed in the *Notice* is neither legally required nor justifiable as sound public policy given the state and nature of the advanced services market. History has shown that separate affiliates result in increased costs, lost efficiencies, and less innovation, and place ILECs at a competitive disadvantage vis-à-vis their competitors. The Commission need only look to the tortured history of the FCC's efforts to create a separate affiliate framework for BOC provision of enhanced services to understand how detrimental such a framework can be to the deployment of competitive new services to consumers. Rather than introduce this failed model into the competitive advanced services market, the Commission should explore alternative methods through which it can use its authority to interpret the Act and its forbearance authority to facilitate ILEC provision of advanced services on an integrated basis. Separate affiliates are no substitute for market forces when the market -- as here -- is competitive, and they are not preferable to less burdensome regulatory approaches where markets are not fully competitive.

A. THE COMMISSION'S *COMPUTER II* AND *III* PROCEEDINGS ESTABLISH THE IMPORTANCE OF ENABLING THE PROVISION OF COMPETITIVE SERVICES ON AN INTEGRATED BASIS

The Commission's *Computer II*[24] and *III*[25] proceedings provide the paradigmatic example of how an inflexible regulatory framework, though well-intentioned, can discourage the

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24 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) ("*Computer II Order*"), *recon.*, 84 FCC 2d 50 (1980) ("*Computer II Recon. Order*"), *further recon.*, 88 FCC 2d 512 (1981), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983).

25 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("*Computer III Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Recon. Order*"), *further recon.*, 3

development of innovative services. In *Computer II*, the Commission established a rigid framework that required AT&T (and after divestiture, the BOCs) to provide enhanced services through a separate affiliate. This framework, as the Commission learned, "hinder[ed] the introduction of enhanced services that could benefit the public by being widely and efficiently available through the BOCs' local exchanges."[26] Accordingly, the Commission properly eliminated the separate affiliate requirement for AT&T and the BOCs in favor of a regulatory framework that facilitated integrated service offerings. The results are apparent: consumers now have greater access to an increasing variety of innovative enhanced services.

1. The *Computer II* Proceeding

In the *Computer II* proceeding, the Commission attempted to address new issues "raised by the confluence of communications and data processing."[27] That "confluence" enabled a carrier to provide both "plain old telephone service" ("POTS") and enhanced services using the same underlying phone network. The *Computer II* proceeding was initiated to develop a framework that would permit regulated carriers to provide enhanced services while deterring

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FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Computer III Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); Phase II, 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *Computer III Remand Proceedings:Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995) (collectively, "the *Computer III* proceeding").

26 *Computer III Order*, 104 FCC 2d at 1007, ¶ 89.

27 *Computer II Order*, 77 FCC 2d at 386, ¶ 2.

such carriers from misallocating the costs of the competitive enhanced service to its captive ratepayers or from discriminating against its enhanced services competitors that relied on access to the underlying network services.

In the *Computer II Order*, the Commission attempted to address its cost allocation and discrimination concerns by requiring AT&T (and later the BOCs) to provide enhanced services through a separate affiliate. At the time, the Commission thought that a separate affiliate would "preserve as many of the putative advantages of integration as possible and [would] limit the disadvantages."[28]

Accordingly, the Commission imposed a rigid separate affiliate requirement on the provision of enhanced services by AT&T and the BOCs. The Commission required that the separate affiliate maintain its own books of account.[29] An enhanced services affiliate was also required to "have its own operating, marketing, installation and maintenance personnel for the services and equipment it offers"[30] and was prohibited "from using in common any leased or owned physical space or property" on which facilities used for basic telecommunications services were located.[31] In addition, the Commission also required AT&T and the BOCs to obtain approval of capitalization plans for their enhanced services affiliates.[32] In adopting these

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28 *Id.* at 461, ¶ 202.

29 *Computer II Order*, 77 FCC 2d at 476, ¶ 236.

30 *Id.* at 477, ¶ 239.

31 *Id.* at 477, ¶ 240.

32 *Id.* at 485, ¶ 258.

and other separation requirements, the Commission believed that it had adopted only the "minimum necessary" to address its regulatory concerns.[33]

2. The *Computer III* Proceeding

In the *Computer III* proceeding, the Commission concluded that it had not, in fact, imposed the "minimum necessary" to address its regulatory concerns. Rather, the Commission learned that the separate affiliate requirement substantially increased the costs of providing enhanced services, diminished inherent efficiencies, and ultimately discouraged innovation and deployment of enhanced service capabilities. Specifically, the Commission found that by deterring the BOC provision of enhanced services, the Commission's rules had the unintended effect of diminishing innovation and competitive investment throughout the industry. Regarding costs, the Commission observed that separation required the wasteful duplication of facilities, personnel and resources. Separation also resulted in substantial inefficiencies, as "BOCs [were] unable to organize their operations in the manner best suited to the markets and the customers they serve" and were unable to offer "system solutions" to their customers' service needs.[34]

Moreover, the Commission recognized that its separate affiliate framework had effectively denied consumers the benefits of innovative new services.[35] The Commission pointed to the proposed Custom Calling II VMS service, a voice mail type service, as an example of a service that had been "completely foreclosed to the public" because of the *Computer II* separate affiliate rules.[36] Pre-divestiture AT&T had requested a waiver of the *Computer II*

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33 *Id.* at 476, ¶ 235.

34 *Computer III Order*, 104 FCC 2d at 1008, ¶ 91.

35 *Id.* at 1007, ¶ 89.

36 *Id.* at 1008, ¶ 90.

separate affiliate requirement to allow the BOCs to provide Custom Calling II on an integrated basis.[37] The Commission denied the waiver, finding, among other things, that AT&T could provide Custom Calling II through a separate subsidiary "economically" and that AT&T had not shown that "others will not be able to provide the service ubiquitously."[38] In fact, as of the date of the *Computer III Order*, "no such network-based services ha[d] been offered."[39] The Commission particularly noted that, while services similar to Custom Calling II were on the market, "the *Computer II* regulatory regime . . . prevented consumers, *and particularly small-business and residential consumers*, from having yet another choice . . . in the VMS marketplace."[40]

As a result of the Commission's experience with Custom Calling II and the *Computer II* framework in general, the Commission concluded that "there is at least a substantial likelihood that [the Commission's] regulations in this area have been part of the problem, not part of the solution."[41] Accordingly, the Commission eliminated the separate affiliate requirement for the provision of enhanced services by AT&T and the BOCs and replaced them with a more reasonable framework of non-structural safeguards. These non-structural safeguards included the development of Comparably Efficient Interconnection and Open Network

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37 *See American Telephone & Telegraph Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion and Order, 88 FCC 2d 1 (1981).

38 *Id.* at 26-27, ¶¶ 85, 87.

39 *Computer III Order*, 104 FCC 2d at 1008, ¶ 90.

40 *Id.* (emphasis added).

41 *Id.* at 1003, ¶ 79.

Architecture to ensure that competitors were afforded an equal opportunity to compete, and cost allocation rules to protect ratepayers against cost misallocation.

The effect of eliminating *Computer II*'s separate affiliate requirement on the deployment of enhanced services has been unmistakable. As early as 1991, the Commission observed that "BOCs have provided voice mail service, E-Mail, gateways, electronic data interchange, data processing, voice store-and-forward, and fax store-and-forward services."[42] The Commission was particularly impressed with the deployment of voice mail services, noting that "[i]n the relatively brief time that the BOCs have been permitted to provide that service, voice mail has been provided to rapidly increasing numbers of customers in their regions at reasonable prices."[43] Moreover, as the Commission noted in 1995, structural separation proved to be unnecessary to prevent discriminatory treatment by the BOCs against their competitors.[44] In short, replacing structural separation with a framework that permitted the BOCs to offer enhanced services on an integrated basis achieved the results that the Commission is seeking to achieve here: the deployment of innovative new services on an efficient and timely basis and the development of a robustly competitive market.

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42 *BOC Safeguards Order*, 6 FCC Rcd at 7575, at ¶ 7.

43 *Id.* Indeed, voice-mail services are now available to approximately 90% of BellSouth customers from multiple service providers.

44 *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8379, ¶ 29 (1995).

B. THE COMMISSION SHOULD ADOPT A FRAMEWORK THAT WILL ENCOUARGE ILEC PROVISION OF ADVANCED SERVICES ON AN INTEGRATED BASIS

Given the proven success of using a non-structural safeguards framework in promoting the deployment of enhanced services, the Commission should adopt a framework in this proceeding that will similarly encourage ILEC provision of advanced services on an integrated basis. As in the enhanced services context, integrated operation will allow ILECs to enjoy economies of scope and realize efficiencies of operation, which will lead to broader deployment and lower cost for consumers. Moreover, non-structural safeguards here can effectively assure that competitors have access to the facilities and capabilities they require to provide advanced services. Indeed, these safeguards are already in place. For example, existing rules granting competitors nondiscriminatory access to unbundled network elements of the circuit-switched network ensure that competitive advanced services providers will have sufficient capabilities to provide a competing service to consumers. Price caps and resale requirements, not to mention competition in capital markets, effectively eliminate any incentives for anticompetitive cost misallocation.

Moreover, facilitating ILEC provision of advanced services on an integrated basis will promote competition by reducing regulatory distinctions among competing providers. ILECs face competition in the advanced services market from cable operators, satellite service providers, and other telcos. These competitors may freely structure their businesses in any manner that they believe best responds to market conditions. An asymmetrical regulatory policy that fails to provide ILECs with similar flexibility would only distort this competitive market by raising ILECs' costs and diminishing their ability to respond to consumer demand.

The Commission should not entertain the mistaken notion that Section 272 of the Act[45] in any way diminishes the detrimental effect that a separate affiliate framework could have on the deployment of advanced services. Congress enacted Section 272 as the transition mechanism through which BOCs would be able to enter the interLATA market, from which they had been previously excluded. To that end, Congress imposed exceedingly stringent separation requirements, but limited Section 272's application to BOC affiliates providing interLATA services and, even in that instance, limited the application of Section 272 to three years from the date of grant of Section 271 relief.[46]

Advanced services such as DSL service, however, are distinctly different in kind and regulatory consequence. They function as access services connecting consumers to information located on the Internet or on other data networks via ISP platforms. As Congress did not include access services within the scope of Section 272, the Commission should not now circumvent Congress' framework by relying on a Section 272-type framework in this proceeding. To the contrary, the Commission should fulfill Congress' intentions by expeditiously granting Section 271 relief so that BOCs can provide interLATA data services on par with its competitors and thereby be given the ability to compete fully in the entire advanced services market.[47]

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45 47 U.S.C. § 272.

46 *Id.* § 272(A)(2), (f)(1).

47 *See* Section V *infra.*

IV. IN PLACE OF THE SEPARATE AFFILIATE APPROACH, THE COMMISSION SHOULD INTERPRET THE COMMUNICATIONS ACT TO REMOVE REGULATORY IMPEDIMENTS TO ILEC INVESTMENT IN ADVANCED SERVICES

As explained above, a regulatory approach that facilitates ILEC provision of advanced services on an integrated basis will most effectively promote competition in the mass market for advanced services. Even if the Commission correctly has decided that it cannot forbear from Section 251(c) for ILEC's advanced services, the Commission still retains ample authority to interpret the Act in a manner that does not diminish ILECs' incentives to invest in the provision of advanced services.

Such an interpretation requires, at a minimum, that the Commission refrain from adopting burdensome new unbundling and resale rules for advanced services that fail to reflect the evolving nature of the advanced services market. Equally important, the Commission must aggressively exercise its forbearance authority to grant relief in appropriate cases from dominant carrier pricing and tariffing requirements applicable to ILECs' advanced services offerings. Finally, the Commission must be vigilant in identifying and eliminating other existing or potential barriers that inhibit ILEC investment in advanced services, especially those barriers that restrict the ability of ILECs to provide interLATA advanced services on the same basis as their competitors.

Adopting this framework will help ensure that competition, not regulation, remains the driving force behind the deployment of advanced services. Competition cannot develop without distortion as long as certain players are excluded from significant portions of the market or are otherwise handicapped.

A. THE COMMISSION SHOULD ADOPT UNBUNDLING AND RESALE RULES THAT REFLECT THE EQUAL OPPORTUNITY THAT ALL COMPETITORS HAVE TO INVEST IN THE DEPLOYMENT OF ADVANCED SERVICES

In the *Notice*, the Commission appears to be proceeding under the incorrect assumption that it may not treat advanced services differently from POTS under Section 251(c) of the Act unless the advanced services are not provided by an ILEC (*i.e.*, are structurally separate from the local exchange business of the ILEC). Structural separation, however, is unnecessary and ill-advised. The Commission instead can and should use its discretion to avoid prescribing unbundling and resale rules that discourage investment in advanced services by both ILECs and new entrants.

1. The Commission Should Not Adopt Prescriptive Unbundling Rules For Advanced Services Equipment

The mass market for advanced services is an emerging market. While many firms are vying to become the leading provider of broadband access to the Internet and other data services, advanced services are not yet available to most Americans. A firm's success or failure in the advanced services market will depend upon many factors, including consumer demand, the quality and price of service, and the development of increasingly sophisticated technologies. Ideally, the Commission's regulatory framework should not also be one of these factors.

Because the mass market for advanced services is still developing, the Commission should avoid the temptation to micromanage it through burdensome, prescriptive national rules that are based on speculative harms and that easily could delay the deployment of advanced services. In particular, the Commission should not assume that it *must* impose specific unbundling requirements on network elements used by ILECs to provide advanced services simply because it interpreted Section 251(c) *to apply* to network elements used to provide such

services. As the Commission has noted, it has the authority "to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access."[48] The Commission must also refrain from requiring unbundling where the ILEC's failure to provide requested network elements will not impair the ability of the requesting carrier to provide its services.[49] Similarly, the Commission has the authority to refrain from adopting any specific unbundling proposals and to allow negotiation and arbitration to decide whether unbundling of advanced services network elements is appropriate.

Declining to prescribe national rules does *not* mean that competitive advanced services providers will be denied access to the elements they need to provide service. The rules adopted in the *Local Competition Order* guarantee that competitors will be able to provide their own advanced services by purchasing elements of the underlying circuit-switched network on an unbundled basis. Indeed, BellSouth already has made available unbundled network elements that support the deployment of DSL services, enabling competitors to deploy the equipment of their choice. Competitors may then attach their own DSLAM or other advanced services equipment

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48 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15640, ¶ 278 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted,* 118 S. Ct. 879 (1998) ("*Local Competition Order*"), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *aff'd sub nom. Southwestern Bell Telephone Company v. FCC,* Case Nos. 97-3389, 97-357, 97-3663, and 97-4106, (8th Cir., August 10, 1998), *further reconsideration pending.*

49 47 U.S.C. § 271(d)(2).

to these elements.[50] In this sense, ILECs do not enjoy any competitive advantage, as they too must make the same new investments to deploy their own advanced services networks.

Moreover, the Commission must not view ADSL as the only advanced services product that will be offered by the ILECs, but should recognize ADSL technology as a transitional method of providing additional bandwidth for advanced services over the local loop. Not only will ADSL technology evolve, BellSouth and other ILECs continue to place fiber deeper into their networks. These placements include fiber-to-the curb. As these fiber deployments expand, it is inevitable that advanced services will transition likewise to the fiber networks. Thus, any broad determinations that the Commission might make now relative to unbundling requirements for ADSL are unlikely to transition to fiber-based local loop technologies.

If the Commission refuses to find that unbundling of advanced services equipment is not required under the standards of Section 251, and competitors correspondingly are granted some type of access to an ILEC's advanced services equipment, the negotiation and arbitration process established in Sections 251 and 252 of the Act provides sufficient opportunity for the competitor to obtain such access without Commission intervention and better fits the fluid nature of the market and the technologies. Congress specifically permitted parties to negotiate and enter into binding agreements for unbundling of network elements "without regard to the standards set

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50 As Commissioner Ness has observed, "[t]he evolving DSL equipment necessary to carry high-speed digital signals on properly conditioned loops is available to both the ILECs and CLECs. So is the associated multiplexing and routing/switching equipment necessary to create advanced high-speed data communications services." Commissioner Susan Ness, "To Have and Have Not: Advanced Telecommunications Technologies," Remarks Before the Computer and Communications Industry Association's 1998 Washington Caucus (June 9, 1998).

forth in" Section 251(b) and (c).[51] Congress also granted state commissions the authority to arbitrate disputes arising out of such negotiations.[52] As the Commission noted in the *Local Competition Order*, state commissions have full authority to require ILECs to unbundle elements that the Commission does not specify.[53] The Commission should not assume that advanced services equipment (if actually needed for competitive entry) will not be available on an unbundled basis unless the Commission requires it on a national level. Rather, the Commission should first rely on voluntary negotiations and, if they fail, trust the state commissions to fulfill their statutory responsibility to make advanced services equipment available to competitors where appropriate under Sections 251 and 252.

2. The Commission Should Retain Resale Rules That Grant ILECs The Flexibility To Offer DSL Service On A Wholesale Basis

In the *Notice*, the Commission proposes to apply Section 251(c)(4) resale obligations to ILEC provision of advanced services, regardless of whether such services are local exchange or exchange access services.[54] This proposal is founded upon the Commission's assmption that advanced services are generally marketed to residential or business users or to Internet service providers ("ISPs"). Under the Commission's assumption, because these users are not telecommunications carriers, advanced services must be subject to Section 251(c)(4) resale requirements.

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51 47 U.S.C. § 252(a)(1).

52 *Id.* § 252(b)(1).

53 *See Local Competition Order*, 11 FCC Rcd at 15625, ¶ 244.

54 *Notice* at ¶ 189.

The Commission's analysis fundamentally misreads the requirements of Section 251(c)(4). Under Section 251(c)(4), an ILEC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[55] Thus, by its express terms, the Section 251(c)(4) resale obligations only apply if (1) a service is offered at retail and (2) the service is offered to subscribers who are not telecommunications carriers. The Commission's proposal ignores the first part of this two-part test.

Under the Commission's proposal, advanced services are subject to Section 251(c)(4) resale obligations because, in the Commission's view, advanced services customers are generally residential and business customers or ISPs, and not other telecommunications carriers. Even if this were an accurate description of the market, it alone would not subject an ILEC's advanced services offering to Section 251(c)(4). As the Commission has recognized, Section 251(c)(4) "does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers."[56] There clearly are scenarios where ILEC advanced services offerings will not be sold at retail, but will be sold in bulk to ISPs or carriers for incorporation into the service they provide to their customers. In such cases, the actual costs of providing the advanced services will be the same regardless of whether the customer is an ISP or a carrier.

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55 47 U.S.C. § 251(c)(4).

56 *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 872.

In the *Local Competition Order*, the Commission noted that, even though "end users do occasionally purchase some access services,"[57] exchange access services are not subject to Section 251(c)(4) resale requirements because they are "predominantly offered to, and taken by, IXCs, not end users."[58] Similarly, the Commission should not impose Section 251(c)(4) resale obligations on an ILEC that chooses to market its advanced services on a predominantly wholesale basis, regardless of whether end users occasionally purchase such services.

B. THE COMMISSION MUST AGGRESSIVELY IMPLEMENT ITS SECTION 10 FORBEARANCE MANDATE TO REMOVE PRICING AND TARIFFING RESTRICTIONS THAT IMPEDE ILECS' ABILITY TO RESPOND TO MARKET CONDITIONS

Although this proceeding is intended to facilitate the deployment of advanced services, conspicuously absent from the *Notice* is any discussion of providing ILECs that offer advanced services on an integrated basis relief from dominant carrier pricing and tariffing restrictions.[59] Since the *Competitive Carrier* proceeding in the early 1980s,[60] the Commission has recognized that stringent pricing and tariffing restrictions for carriers without market power

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57 *Id.* at 15934, ¶ 873.

58 *Id.* at 15935, ¶ 874.

59 Dominant carrier regulation includes (1) any applicable price cap or rate of return regulation for ILEC provision of advanced services, (2) the requirement that ILECs file tariffs on more than one day's notice with cost support, (3) restrictions on contract carriage, and (4) any dominant carrier Section 214 requirements that may apply.

60 *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore*, CC Dkt. 79-252, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Fifth Report and Order, 98 FCC 2d 1191 ("*Competitive Carrier Fifth Report and Order*"); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated sub nom. MCI Tel. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively, the "*Competitive Carrier* proceeding").

are unnecessary and, indeed, unwise. As explained in BellSouth's *NOI* comments, ILECs that provide DSL services do not possess market power in the advanced services market.[61] Removal of dominant carrier regulation on ILEC provision of DSL service is accordingly an important step in creating incentives for the deployment of advanced services.

The Commission should aggressively exercise its forbearance authority and grant relief from dominant carrier pricing and tariffing requirements. Even if the Commission is correct in its determination that it cannot forbear from the unbundling and resale obligations of Section 251(c),[62] the Commission retains full authority to forbear from pricing and tariffing regulations, as such regulations do not implicate the ILEC obligations of Section 251(c) or the interLATA restrictions on BOCs contained in Section 271.[63] Indeed, under Section 10, the Commission is *required* to forbear from any regulatory requirement or statutory provision for which (1) enforcement is not necessary to ensure that rates and practices of a telecommunications carrier or service are just, reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[64] In making its public interest determination, Congress has instructed the Commission to consider whether forbearance will promote competitive market conditions,

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61 *See* BellSouth *NOI* Comments at 31-36.

62 *Order* at ¶ 79.

63 47 U.S.C. § 160(d).

64 *Id.* § 160(a); *see also* Powell Remarks ("Congress . . . made a number of changes itself directly [in the 1996 Act] . . . [p]erhaps non more important than regulatory forbearance, which commands us not to apply any regulation if we determine certain things.").

including whether forbearance will enhance competition among telecommunications service providers.[65]

Where a carrier is non-dominant in a particular service, the Commission has effectively determined that the elements for Section 10 forbearance are present.[66] In the *Competitive Carrier* proceeding, the Commission determined that it was in the public interest to streamline regulation of non-dominant carriers and provide such carriers with flexibility to establish their prices and service offerings in response to market demand. The Commission found that regulation was unnecessary to protect against unjust, unreasonable, and discriminatory rates because market forces would amply provide such protection.[67] Moreover, even without stringent dominant carrier pricing and tariffing regulations, consumers would be protected because they "could always turn to competitors."[68] In light of the Commission's long-standing policy on streamlining regulation of non-dominant carriers, the Commission should freely grant forbearance from dominant carrier pricing and tariffing requirements for advanced services offerings in any case in which the requesting carrier demonstrates its lack of market power in the advanced services market.

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65 *Id.* § 160(b).

66 *See, e.g., Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) ("*AT&T Reclassification Order*"), Order on Reconsideration, Order Denying Petition for Rulemaking, Second Order on Reconsideration in CC Docket No. 96-61, 12 FCC Rcd 20787 (1997).

67 *See* Powell Remarks ("it is plain to see that the market is a replacement for regulators making decisions about what services will be offered, what technology will be deployed, by whom, to whom, and at what price.").

68 *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 12 FCC Rcd 1111, 1131 n.75; *see also Comsat Corporation*, Order and Notice of Proposed Rulemaking, File No. 60-SAT-ISP-97, FCC 98-78, at ¶ 9 (rel. April 28, 1998).

V. THE COMMISSION SHOULD ACT QUICKLY TO REMOVE THE PRINCIPAL REGULATORY BARRIER TO ROBUST COMPETITION AND INVESTMENT IN THE ADVANCED SERVICES MARKET: THE INTERLATA PROHIBITION

The procompetitive proposals outlined in these comments are only initial measures that the Commission should take in this proceeding to foster competition in and deployment of advanced services. If the Commission goes no further, however, its actions will have a relatively small impact on BOCs' investment in advanced services. Without interLATA relief, BOCs will be hamstrung in their ability to satisfy customers' demand for end-to-end high-speed data services and will have severely limited access to the revenues available to support advanced services initiatives. Customers demand that high-speed access services, like ADSL and cable modems, not be impeded by bottlenecks within the Internet itself, as is evident from the major cable operators' initiatives to construct nationwide backbones and caching servers. BOCs must similarly be permitted to ensure that their customers get the full benefit of end-to-end high-speed access service.

Every other actual or potential provider of advanced services capabilities -- including GTE, other non-BOC ILECs, CLECs, and cable operators -- may provide their customers with end-to-end networking services regardless of geography, while the BOCs are required to hand off their high-bandwidth signals to other carriers at LATA borders.[69] This regulatory restriction operates as a substantial competitive disadvantage to the BOCs vis-à-vis their many broadband competitors. BOCs alone cannot provide their advanced services customers assurance of end-to-end service quality and security, as they demand. Nor do BOCs have full access to the advanced services market's growing revenues to support their investment.

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[69] *See* BellSouth *NOI* Comments at 44-46.

If the Commission truly seeks to promote the deployment of advanced services on a timely basis, it is imperative that it promptly grant Section 271 petitions and remove this high hurdle to full-fledged competition.[70] Without this relief, BOCs' opportunity to invest profitably in broad-scale deployment of advanced services throughout their regions will be severly constrained.

While BellSouth does not object to the Commission's liberally granting petitions for LATA boundary modifications for advanced services, and encourages the Commission to do so, the Commission must not be deluded: such modifications will have little, if any, impact on competition or on BellSouth's investment incentives. LATA boundaries are legal constructs that arose out of divestiture more than a decade ago and do not represent an efficient geographic division for advanced services networks. Modifying LATA boundaries to permit BOCs to deploy advanced services, while a procompetitive gesture, would not address the fundamental incompatibility of the LATA construct with the provision of advanced services and would leave BOCs at a substantial competitive disadvantage and with limited investment incentives. It is access to the interLATA market that will drive increased investment and rapid, broad-scale deployment of services such as ADSL.

VI. AN ILEC AFFILIATE THAT COMPLIES WITH THE SEPARATION REQUIREMENTS ADOPTED IN THE *COMPETITIVE CARRIER* PROCEEDING SHOULD NOT BE DEEMED AN ILEC

The unbundling and resale obligations of Section 251(c) apply only to firms who were ILECs when the 1996 Act was enacted and to their "successor and assigns."[71] In the *Notice*, the Commission proposes to allow ILECs to create a "truly" separate advanced services

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[70] At a minimum, the Commission should not attempt to use this proceeding to impose additional roadblocks or conditions on the ability of BOCs to obtain Section 271 relief.

[71] 47 U.S.C. § 251(h).

affiliate that would not be deemed a successor or assign of an ILEC and, thus, would not be subject to Section 251(c) requirements.[72]

As explained above, the separate affiliate concept proposed in the *Notice* is simply the wrong approach to adopt for ILEC provision of advanced services. If the Commission seeks to promote the deployment of advanced services, then it should adopt reasonable interpretations of the Act that permit ILECs to provide services on an integrated basis. Without this ability, the "option" of forming a separate affiliate effectively operates as a Commission mandate directing ILECs to provide advanced services using a prescribed business structure. Rather than proceed down that path, BellSouth urges the Commission to abandon the separate affiliate approach altogether and concentrate instead on facilitating ILEC deployment of advanced services on an integrated basis.

The Commission should not misconstrue the discussion in the remainder of this section. BellSouth strongly believes that the recent imposition of the *Competitive Carrier* separation requirements with respect to in-region CMRS services and non-BOC provision of in-region, interexchange services are unwarranted and excessive. Nonetheless, the precedent of those cases precludes the Commission from imposing a greater degree of separation in order for advanced services affiliates to avoid the obligations of their affiliated ILECs. Indeed, a significantly lesser degree of separation is sufficient to achieve that end.

If the Commission persists in formulating a separate affiliate option for the provision of advanced services, BellSouth opposes the current proposed framework because it far exceeds what is legally and practically necessary to form a non-ILEC affiliate. Rather than

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72 *Notice* at ¶ 92.

impose the rigid separation requirements of Section 272, which were designed merely as a transition framework for BOC entry into interLATA services, the Commission should follow its more recent decisions and base any separation requirements upon the framework developed in the *Competitive Carrier* proceeding. This framework provides greater flexibility to achieve some of the efficiencies of integrated operation while adequately insulating the affiliate from ILEC status.

A. THE COMMISSION SHOULD NOT RELY ON SECTION 272 IN DEVELOPING THE SEPARATION REQUIREMENTS FOR ADVANCED SERVICES AFFILIATES.

In the *Notice*, the Commission proposes a variety of structural separation and nondiscrimination requirements with which ILECs' advanced services affiliates would be required to comply to escape ILEC status.[73] These requirements are derived from the separation requirements contained in Section 272 of the Act[74] and from the Commission decisions implementing that section.[75] Section 272, however, is concerned with the unique situation of BOC entry into the interLATA market, a market from which BOCs have been excluded since

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73 *Id.* at ¶ 96.

74 47 U.S.C. § 272.

75 *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"), Order on Reconsideration, 12 FCC Rcd 2297 (1997), *recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir. filed Mar. 31, 1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom.* Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997), Second Report and Order, 12 FCC Rcd 15756 (1997); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539 (1996).

1984. The Section 272 framework far exceeds what is required for intraLATA advanced services affiliates to avoid ILEC obligations and should not be adopted in this proceeding.

In enacting the 1996 Act, Congress sought to create a procompetitive, deregulatory framework that would, among other things, increase competition in interLATA services by removing the bar on BOC entry into that market. To that end, Congress enacted Section 272 to serve as a transition mechanism between complete prohibition and full-fledged BOC participation in the interLATA market. By its terms, the Section 272 separate affiliate requirement for interLATA services must end "3 years after the date [a BOC or BOC affiliate] is authorized to provide interLATA telecommunication services under Section 271(d)," unless extended by the Commission.[76] Nothing in this transition framework suggests that Congress believed that Section 272 separation requirements represented a preferred method of encouraging the deployment of new and innovative services or that compliance with Section 272 would be required to avoid ILEC status. Given the unique regulatory setting that Section 272 was intended to address, the Commission should not rely on the Section 272 framework to determine whether an ILEC affiliate will be deemed to be an ILEC for purposes of Section 251(c).

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[76] 47 U.S.C. § 272(f)(1). In addition, the Commission may forbear from applying Section 272 in appropriate circumstances prior to the expiration of the three-year term. *Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, Memorandum Opinion and Order, CC Dkt. No. 96-149, DA 98-220 (CCB Feb. 6, 1998), *errata*, Mar. 3, 1998.

B. THE SEPARATE AFFILIATE FRAMEWORK DEVELOPED IN THE *COMPETITIVE CARRIER* PROCEEDING IS MORE THAN SUFFICIENT TO INSULATE ADVANCED SERVICES AFFILIATES FROM ILEC STATUS

The central purpose of a separate affiliate option is to establish "separation requirements for advanced services affiliates [that would be] sufficient for those affiliates to be deemed non-incumbent LECs."[77] A separation framework based on the *Competitive Carrier* model would more than satisfy this objective. Under a modified version of this framework, an advanced services affiliate would not be deemed an ILEC if the affiliate (1) maintains separate books of account, (2) does not jointly own transmission or switching facilities with its affiliated LEC that the LEC uses for the provision of local exchange services in the same in-region market, (3) acquires telecommunications facilities, services, or network elements from the affiliated LEC pursuant to tariff or a negotiated agreement under Sections 251 and 252 of the Act, and (4) acquires non-telecommunications services from affiliated LEC on an arm's length basis pursuant to the Commission's affiliate transaction rules.[78] As explained below, the *Competitive Carrier* framework fulfills all of the goals behind forming a separate affiliate while providing ILECs with greater flexibility to structure their business operations in a manner that better comports to market demands.

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77 *Notice* at ¶ 96.

78 *See, e.g., Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9; *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Service*, Report and Order, 12 FCC Rcd 15668, 15673, ¶ 5 (1997) ("*LEC-CMRS Order*"), *clarification*, 12 FCC Rcd 17983 (1997).

1. The *Competitive Carrier* Framework Ensures That Advanced Services Affiliates Are Not Deemed ILECs

In the 1996 Act, Congress adopted a precise and limited definition of which entities would be considered ILECs and would be subject to the obligations of Section 251(c). ILECs are only those entities that were members of the National Exchange Carriers Association ("NECA") on the date of enactment of the 1996 Act, or their successors and assigns.[79] As no advanced services affiliate would have been a member of NECA in 1996, such affiliates could only be deemed ILECs if they are "successors or assigns" of an ILEC.

In adopting a limited definition of an ILEC, Congress intended that ILEC status, and the obligations tied to that status, should only apply to entities that controlled the embedded phone network and not to entities that were merely affiliated with ILECs.[80] The Commission recognized the limited meaning of a "successor or assign" in the *Non-Accounting Safeguards Order*. There, the Commission expressed concern that a BOC would be able to circumvent the requirements of Section 272 by transferring "key local exchange and exchange access services and facilities to the 272 affiliate."[81] The Commission concluded, however, that such a transfer could not circumvent Section 272 because "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," the transferee would be an "assign" of the BOC and thus, would also be subject to

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79 47 U.S.C. § 251(h). The Commission also may treat a carrier as an ILEC if the carrier occupies a market position comparable to that of an ILEC, the carrier has substantially replaced the ILEC, and such treatment is in the pubic interest. *Id.* There can be no reasonable argument that an advanced services affiliate would fall within these criteria.

80 *Compare id.* § 271(a) (restricting interLATA services provided by BOCs or "any affiliate" of a BOC).

81 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054, ¶ 309.

Section 272.[82] Similarly, only where the advanced services affiliate becomes a "successor" of the LEC (*e.g.*, through a merger) or becomes an "assign" of the LEC by obtaining ownership over "key local exchange and exchange access services and facilities" should such affiliate be deemed an ILEC subject to the obligations of Section 251(c).

A separate affiliate that complies with the *Competitive Carrier* framework sufficiently insulates the affiliate from ILEC status. Such an affiliate is not a successor of the ILEC, as the ILEC will continue to provide local exchange and exchange access services in its region. Nor is an advanced services affiliate an assign of the ILEC. The ILEC would retain ownership over all of the network elements of the underlying circuit-switched network. Only facilities and services that are used to provide DSL service or other advanced services would be transferred to the affiliate.[83] Accordingly, adopting the *Competitive Carrier* separation approach, rather than the more onerous Section 272 model, for advanced services affiliates fulfills the primary objective of the separate affiliate option: to allow an ILEC to provide advanced services without being subject to Section 251(c) obligations.

2. The *Competitive Carrier* Framework Protects Against Cost Misallocation And Discriminatory Treatment

As explained above, a separate affiliate framework is unnecessary to protect against cost misallocation and discriminatory practices. The Commission has long recognized that price cap regulation and resale requirements greatly diminish the incentive that a carrier may

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82 *Id.*

83 *See* Section VI.C *infra* for a discussion of transfers to the advanced services affiliates.

have to misallocate costs.[84] Other non-structural safeguards, such as the ability of competitors to obtain unbundled network elements to provide their own advanced services, also protect against discrimination. However, to the extent an ILEC chooses to offer advanced services using a separate affiliate, the *Competitive Carrier* framework addresses any lingering concerns about cost misallocation and discriminatory practices. The Commission has used the *Competitive Carrier* separation model to address concerns regarding cost misallocation and discrimination since it issued the *Competitive Carrier Fifth Report and Order* in 1984. In the *Competitive Carrier Fifth Report and Order*, the Commission determined that independent LECs providing domestic, interstate, interexchange services through a separate affiliate that complied with certain separation safeguards would not be regulated as dominant in those services. The Commission required that the affiliate (1) have separate books of account, (2) must not jointly own transmission or switching facilities with the LEC, and (3) must acquire services from the LEC pursuant to tariff.[85] The Commission has recently reasserted the adequacy of the *Competitive Carrier* framework to protect against cost misallocation and discrimination for non-BOC provision of in-region interstate, domestic, interexchange services in the *Dom/Nondom Order*.[86]

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84 *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Dkt. No. 95-20, FCC 98-8, at ¶¶ 44, 58 (rel. Jan. 30, 1998); *Price Cap Performance Review for AT&T*, 8 FCC Rcd 6968, 6968, ¶ 3 (1993).

85 *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

86 *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15854, ¶ 170 (1997), Reconsideration Order, FCC 97-229 (rel. June 27, 1997) ("*Dom/Nondom Order*").

Similarly, the Commission relied on a modified version of the *Competitive Carrier* framework to alleviate concerns of cost misallocation and discriminatory interconnection in the *LEC-CMRS Order*. In that order, the Commission concluded that a *Competitive Carrier* level of separation between an ILEC and its in-region CMRS affiliate "provides an adequate measure of transparency between an incumbent LEC's wireline and in-region CMRS operations so as to prevent improper cost allocations and to ensure that competing CMRS providers are receiving nondiscriminatory treatment."[87] The Commission specifically rejected arguments that more stringent separation requirements, such as those previously required between BOCs and their cellular operations, were necessary to address the Commission's concerns about cost misallocation and discrimination.[88]

In light of these precedents, applying a *Competitive Carrier* framework to ILECs who choose to provide advanced services through a separate affiliate would address any lingering concerns that the Commission may have regarding cost misallocation and discrimination.[89]

3. The *Competitive Carrier* Framework Would Grant ILECs Greater Flexibility And Is More Efficient Than The Proposed "Truly" Separate Affiliate

Adopting a *Competitive Carrier* framework for advanced services affiliates would also allow a greater level of efficiency than would be available under the Commission's proposed "truly" separate affiliate framework. In the *Competitive Carrier Fifth Report and Order*, the Commission declined to require the domestic, interstate, interexchange affiliates of independent

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87 *LEC-CMRS Order*, 12 FCC Rcd at 15703, ¶ 57.

88 *Id.*

89 *See Notice* at ¶ 97.

LECs to employ fully-separated personnel and marketing functions.[90] Similarly, in the *LEC-CMRS Order*, the Commission stated that requiring the CMRS affiliate to have separate officers and employees is not "necessary to prevent anticompetitive discrimination and cost misallocation," especially in light of the Commission's affiliate transaction rules.[91] The Commission specifically noted that "a flat ban on common employees will unnecessarily impose an efficiency cost upon incumbent LECs, and that eschewing these efficiencies is not outweighed by a competitive benefit from such a ban."[92]

Similarly, the Commission should reject the "truly" separate affiliate model proposed in the *Notice* because it would impose enormous efficiency costs on ILECs and their advanced services affiliates. As noted above, a prohibition on common officers, directors, and employees will require unnecessary and wasteful duplication of resources.[93] Similarly, the Commission has recognized that "[m]arketing plays an important role, and represents a significant cost, in bringing new services to the public."[94] The Commission should not "handicap" ILECs by limiting their ability to jointly market advanced services with their affiliates, "particularly when significant competitors in the markets for [advanced] and integrated

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90 *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

91 *LEC-CMRS Order*, 12 FCC Rcd at 15706, ¶ 64.

92 *Id.*

93 *See also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 24012, ¶ 269 (1997) ("Requiring separate officers, employees, and directors would preclude a foreign-affiliated carrier from taking advantage of economies of scale and scope that could allow it to provide better service at lower cost to consumers."), *recon. pending*.

94 *Computer III Order*, 104 FCC 2d at 1012, ¶ 99.

systems are not so limited."[95] For this reason, and the other reasons described above, the Commission not adopt a separate affiliate framework that is any more restrictive than the *Competitive Carrier* framework for ILECs that choose to provide advanced services through a separate affiliate.

C. THE COMMISSION SHOULD ALLOW A ONE-TIME TRANSFER OF ADVANCED SERVICES OPERATIONS TO AN AFFILIATE WITHOUT DEEMING THE AFFILIATE AN ILEC

In the *Notice*, the Commission proposes to permit an ILEC to make certain transfers to its advanced services affiliate without rendering the affiliate a successor or assign of the ILEC.[96] A liberal transfer policy must exist for a separate affiliate alternative to be meaningfully available to ILECs. ILECs such as BellSouth have already begun deploying advanced services in a number of areas. Such ILECs should have an opportunity to centralize their advanced services offering in a single company. Accordingly, BellSouth urges the Commission to allow ILECs choosing a separate affiliate option to make a one-time transfer of its operations into a separate affiliate without rendering the affiliate an ILEC. Any such transfer should be exempt from any nondiscrimination requirement as the Commission proposed.[97]

In particular, any separate affiliate regime adopted by the Commission should allow the transfer of all facilities used specifically to provide advanced services, including the DSLAM, packet switches, and transport facilities.[98] Network elements of the underlying circuit-switched networks, such as loops, would remain within the ILEC and would continue to be

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95 *Id.*

96 *Notice* at ¶¶ 104-115.

97 *Id.* at ¶ 111.

98 *Id.* at ¶ 108.

available to competitors on an unbundled basis. Similarly, the Commission should freely allow the transfer of items other than facilities, such as customer accounts, employees, and brand names, to the advanced services affiliate. These items are necessary parts of an advanced services offering, and they are not elements that competitors require to provide a competitive voice or DSL service.

VII. THE COMMISSION SHOULD NOT TRANSFORM THIS PROCEEDING INTO ANOTHER LOCAL COMPETITION PROCEEDING

The Commission initiated this proceeding to find ways to encourage the deployment of advanced services. It is unfortunate that the Commission has become sidetracked from that objective by proposing to revisit the collocation and loop unbundling rules that it adopted only two years ago. Since the adoption of those rules, states have been diligently fulfilling their responsibility to provide competitors access to local network elements. The Commission should not now preempt the states in the name of promoting the deployment of advanced services. On the contrary, the states, with their greater knowledge of local conditions and their ability to arbitrate on a case-by-case basis, should continue to be at the forefront of implementing the collocation and unbundling rules to promote the development of advanced services. The Commission should maintain the focus of this proceeding on developing a framework that would allow ILECs to deploy advanced services on an integrated basis, and leave to the states the responsibility of implementing the collocation and unbundling requirements in particular cases.

A. THE COMMISSION SHOULD NOT ADOPT ADDITIONAL COLLOCATION AND LOOP UNBUNDLING RULES THAT INCREASE REGULATORY BURDENS ON ILECS AND PREEMPT THE STATE COMMISSIONS

Section 251(c) requires ILECs to provide physical collocation or virtual collocation on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.[99] Section 251(c) also requires ILECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[100] Congress specified that "[w]ithin 6 months after the date of enactment of the [1996 Act], the Commission *shall complete all actions* necessary to establish regulations to implement the requirements of this section."[101]

In the *Local Competition Order*, the Commission adopted collocation and unbundling rules that purported to implement the requirements of Section 251(c). In adopting those rules, the Commission properly chose to rely "heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets."[102] With respect to collocation, the Commission established "minimum requirements for nondiscriminatory collocation arrangements" and granted the states the "flexibility to apply additional collocation requirements."[103] Similarly, the Commission established a "minimum list of unbundled network elements" that ILECs must make available, and specifically requested "the states to evaluate, on a case-by-case basis, whether to require access to sub-loop elements, which

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99 47 U.S.C. § 251(c)(4).

100 *Id.* § 251(c)(3).

101 *Id.* § 251(d)(1) (emphasis added).

102 *Local Competition Order*, 11 FCC Rcd at 15512, ¶ 21.

103 *Id.* at 15784, ¶ 558.

can be facilities or capabilities within the local loop."[104] In accordance with the Commission's decision, state commissions have been diligently implementing the Commission's collocation and unbundling rules. The Commission should not now preempt the work of the state commissions by adopting additional and unnecessary national standards for collocation and loop unbundling.

B. RESPONSES TO SPECIFIC COLLOCATION AND LOOP UNBUNDLING PROPOSALS

1. Allocation And Exhaustion Of Space

BellSouth opposes proposals in the *Notice* that would effectively micromanage the collocation arrangements that ILECs enter into with their competitors. Of particular concern are the Commission's proposals to adopt additional regulations governing the allocation and exhaustion of collocation space at the central office. Availability of collocation space depends on unique local conditions, such as building code requirements, that cannot be effectively regulated at the national level. Accordingly, the Commission should not require ILECs to offer a particular collocation arrangement and should not presume that a certain arrangement is technically feasible at one location simply because it is available at another location.[105] Similarly, the Commission should not adopt presumptive intervals for implementation of collocation arrangements or provision of unbundled network elements. Such a presumption steps over state-established guidelines regarding provisioning timeframes for these elements. Further, to require such intervals would not adequately account for roadblocks, often unforeseen, that may arise in the implementation of collocation or unbundling arrangements. State commissions have

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104 *Id.* at 15624, ¶ 241; 15632, ¶ 259.

105 *Notice* at ¶¶ 137-39.

ample authority to investigate and determine whether an ILEC is delaying collocation or unbundling for improper reasons, and they are in a better position to evaluate on a case-by-case basis whether a delay is justified. The Commission should not use this proceeding to create unnecessary presumptions against ILEC provision of collocation space or unbundled elements.

BellSouth also opposes the Commission's proposals to increase the informational burdens on ILECs. The Commission proposes that ILECs that deny collocation because of space limitations must allow as a matter of right the requesting carrier to tour the premises and that ILECs must collect data and prepare reports on available collocation space, which must include the "measures that the incumbent LEC is taking to make collocation space available."[106] These proposed requirements would only increase the paperwork and personnel burden on ILECs without providing any measurable benefit for facilitating collocation.

The Commission also suggests that allowing a requesting carrier to tour the central office would benefit state commissions. However, the Commission should allow the state commissions to determine what is necessary to help them resolve any collocation disputes. Finally, the proposed reporting requirement would force ILECs to periodically gather information and prepare a report on their collocation space at each of their central offices, regardless of whether any carriers have requested collocation space at those offices. Instead of prescribing inflexible national rules, the Commission should allow the parties to discuss and resolve any issues they may have on a case-by-case basis.

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106 *Id.* at ¶ 147.

2. Provisioning Of The Local Loop

At the outset, the Commission should clarify that, while ILECs are required to provide unbundled local loops to competitive carriers, ILECs are not required to provide assurances that such carriers will be able to provide DSL service to consumers over those loops. Loop characteristics vary greatly, and the quality of a provider's DSL service may be adversely affected by a number of factors, including interaction of loop characteristics (length, gauge, insulation, etc.) with a particular vendor's equipment. For DSL service, a primary factor may be distance. DSL service is generally not feasible when the length of the local loop exceeds 18,000 feet.[107] Depending on the type of DSL technology employed, that figure may be considerably less.[108] Similarly, even if an ILEC can provide DSL service over a particular loop, a competitor may not be able to provide another DSL service because of the differences in technology. Thus, the Commission should not presume that the inability of a competitor to provide DSL service over a loop is the result of discriminatory access on the part of the ILEC.

Similarly, the Commission should not require ILECs to compile comprehensive information about local loop conditions or the ability of a particular loop to handle DSL service.[109] Large ILECs such as BellSouth have literally millions of loops across their regions. Compiling information about loop conditions could take years and the expenditure of an enormous amount of resources. Moreover, such information would almost never be reliable. Changes to loop conditions occur constantly, and attempting to keep track of loop information

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107 BellSouth's ADSL service is designed to operate at distances of less than 18,000 feet.

108 For example, high-rate DSL service generally is limited to distances of less than 12,000 feet.

109 *Id.* at ¶ 157.

that competitors might desire would be an administrative nightmare. Of course, to the extent BellSouth has compiled such information, it will be made available to competitors upon request. The Commission should not, however, force ILECs to gather information about the local loop that they would not otherwise gather and that another carrier may never request.

3. Sub-Loop Unbundling And Collocation At The Remote Terminal

In the *Notice*, the Commission proposes to require ILECs to provide competitive DSL service providers with access to sub-loop elements and access to collocation in remote terminals.[110] While a DLC-delivered loop can transport the DSL's voice channel to the central office, currently installed DLC systems themselves cannot transport the DSL packet data channels.[111] Sub-loop unbundling might enable CLECs to provide DSL services utilizing their own high speed digital facilities to the remote terminal or, alternately, using unbundled high speed facilities where ILEC remote terminal access to high speed digital facilities is available or could be built for transport between the sub-loop and the central office. The Commission should not attempt to prescribe a rule to address this situation, but should continue to leave the issue of sub-loop unbundling to negotiation and, if necessary, arbitration by state commissions. This statutorily prescribed process is uniquely capable of addressing the specific facts of a competitive carrier's unbundling request, while national rulemaking is not.

BellSouth vigorously opposes the Commission's proposal to require ILECs to allow collocation in remote terminals. In the *Notice*, the Commission proposes that ILECs allow

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110 *Id.* at ¶¶ 167-176

111 Although the Commission stated in the *Local Competition Order* that it would be technically feasible to unbundle loops that passed through a DLC system or other remote terminal, that statement is correct only for voice channels. *See id.* at ¶¶ 54, 153 (citing *Local Competition Order*, 11 FCC Rcd at 15692, ¶ 383).

remote terminal collocation unless the ILEC can prove that "with respect to a particular remote terminal . . . there is insufficient space . . . to accommodate the requesting carrier."[112] In most remote terminals, space is quite limited, and ILECs often will be required to deny requests for remote terminal collocation. Additionally, DLC cabinets have severe power and heat dissipation limitations, which could require denial of collocation requests even if space were available. Requiring ILECs to prove in each case that denial of collocation in remote terminals was proper would impose an enormous burden on ILECs without increasing significantly the level of access that competitors obtain.

Moreover, collocation in remote terminals is unnecessary. BellSouth has been able to successfully negotiate agreements that provide competitors access to sub-loop elements without providing collocation at the remote terminals. Instead of collocation, a cross-box to cross-box interconnection arrangement is the established method of providing competitors with full access to all necessary sub-loop elements. Not only is this solution technically feasible, but it has the additional advantage of allowing the competitor to access the unbundled network elements that it has obtained without compromising the security or integrity of its (or the ILEC's) network. Moreover, because the competitor would be utilizing its own DSL equipment within its own housing, the competitor would have greater control over the technical characteristics of the DSL service it offers.

BellSouth opposes the Commission's proposal to require ILECs to provide alternatives to sub-loop unbundling and remote terminal collocation at no extra cost to the

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112 *Id.* at ¶ 174.

requesting carrier.[113] Section 252(d) specifically requires that ILECs receive compensation from requesting carriers based on the cost of providing an unbundled network element. Requiring ILECs to provide carriers with additional alternatives at no extra cost expressly violates Section 252(d) because it would require ILECs to grant carriers additional elements without compensation. In effect, this proposal requires ILECs to subsidize their competitor's entry into the local market. Not only would this proposal distort the competitive advanced services market, it would constitute an attempt to regulate the pricing of unbundled network elements, which is not within the Commission's jurisdiction.[114]. The Commission's proposal is neither necessary to promote competition in advanced services nor valid under the Act, and it should be rejected.

4. Spectrum Unbundling And Management Issues

In the *Notice*, the Commission proposes to address spectrum interference issues related to the transmission of voice and DSL data signals over the same local loop.[115] The *Notice* does not properly distinguish between two separate issues: spectrum management and spectrum unbundling. On the one hand, spectrum management is concerned with limiting noise (*i.e.*, crosstalk) between different loops within a cable sheath. This noise is typically caused by multiple systems, which transmit on different frequencies, being connected to different loops. For example, spectrum management is employed to ensure that data being carried over one loop does not interfere with voice that is being carried over a different loop within the same cable sheath. Spectrum unbundling, on the other hand, refers to the idea of two or more service

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113 *Notice* at ¶ 173.

114 *See Iowa Utils. Bd.*, 120 F.3d at 793-800.

115 *Id.* at ¶ 159.

providers using the same loop to transport different services. Thus, spectrum management and spectrum unbundling are completely separate concepts.

Spectrum management is critical as new systems are deployed using advanced technologies. Fortunately, spectrum management is not new to the industry and efforts have been made to develop proper standards to address this issue. The Commission accordingly should rely on standard-setting bodies, such as ATIS Committee T1, to set guidelines for loop spectrum management.

Spectrum unbundling, however, is a new concept, and one of great concern to BellSouth. As discussed previously, advanced services, such as ADSL, are in their infancy. Providers, including BellSouth, are just beginning to offer such services. While BellSouth's deployment has been very successful from an engineering standpoint, there has been no time to develop universal standards to govern provision and maintenance of such services. In such situations, it is extremely important that the services provided over the loop, both voice and data, are engineered and controlled by the same provider to ensure proper quality to the end user. If the Commission permits a competitor to obtain loop elements for the purpose of providing advanced services only, the underlying voice carrier may be adversely affected by interference caused by incompatible technology. The cause of the interference would be transparent to the subscriber, who would erroneously attribute the reduction in quality to inferior service by the voice carrier. Only by maintaining the requirement that a competitor purchase the loop element as a facility and not as a function can the Commission ensure that accountability over loop quality is adequately maintained.

Moreover, BellSouth does not have any point on its network at which the loop can be unbundled to allow the data portion of the spectrum to go to another carrier while allowing

BellSouth to keep only the voice portion. Accordingly, the Commission cannot, and should not, attempt to force BellSouth, or any other ILEC that has a similar network configuration, to reconstruct its network to allow the loop spectrum to be unbundled.

Finally, and most importantly, the Commission has recognized spectrum unbundling as being completely inappropriate. Indeed, in the *Local Competition Order*, the Commission considered and expressly rejected the concept of spectrum unbundling. The Commission explicitly stated:

> We decline to define a loop element in functional terms rather than in terms of the facility itself. Some parties advocate defining a loop element as merely a functional piece of shared facility, similar to capacity purchased on a shared transport trunk [(i.e. spectrum unbundling)] . . . . While such a definition, based on the types of traffic provided over a facility, may allow for the separation of costs for a facility dedicated to one end user, we conclude that such treatment is inappropriate. *Giving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers maximum flexibility to offer new services to such end users.* In contrast, a definition of a loop element that allows simultaneous access to the loop facility would preclude the provision of certain services in favor of others.[116]

Advanced services are exactly the types of "new services" the Commission referred to in making its decision in the *Local Competition Order* above. The Commission cannot now arbitrarily pick and choose the types of new services for which it will and will not require spectrum unbundling. Nothing has changed since the issuance of *Local Competition Order*. Accordingly, the Commission should follow its own clear precedent and not require ILECs to engage in spectrum unbundling for advanced services.

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116 *See Local Competition Order*, 111 FCC Rcd at 15693, ¶ 385.

5. Attachment Of Equipment

In the *Notice*, the Commission proposes to allow competitors to attach equipment that does not satisfy Bellcore Network Equipment and Building Specifications ("NEBS") requirements if the ILEC uses non-NEBS-compliant equipment.[117] Under this proposal, a competitor would not only be able to attach the "same" equipment that the ILEC uses, but also "equivalent" equipment.[118] BellSouth urges the Commission to modify this proposed rule to allow ILECs to reject the attachment of any equipment on grounds of technical incompatibility if such equipment is either not NEBS compliant or not exactly the same as equipment that the ILEC uses. Protection of the network is vital to ensuring that ILECs and their competitors are able to provide uninterrupted service to consumers. ILECs must retain the ability to reject the attachment of any equipment that they determine may cause harm to the network without becoming entrenched in a dispute about whether a particular variation from equipment that an ILEC uses is significant enough to render such equipment "non-equivalent."

BellSouth supports attempts to create a standard that would facilitate the attachment of equipment at the central office end of the loop. Such uniform standards would facilitate the interconnection of equipment belonging to various competitors and thereby promote competition in advanced services. The Commission must exercise caution, however, to ensure that it does not inadvertently discourage innovation in equipment design. Rather than establish the standard itself, the Commission should allow public standard setting bodies, such as

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117 *Notice* at ¶ 134.

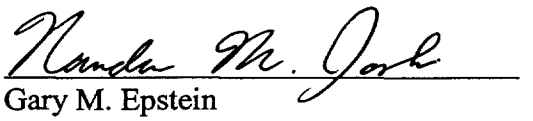
118 *Id.*

Committee T1 to develop the necessary standards for connection of equipment in the central office.

VIII. CONCLUSION

The emerging mass market for advanced services is a shining example of the innovation that can occur when the Commission permits competition to flourish. Explosive consumer demand for advanced telecommunications capabilities has caused firms from across traditional industry lines to develop innovative technologies to bring those capabilities to an ever greater number of people. The question in this proceeding is not whether advanced services will be deployed, but how quickly will they be deployed to "all Americans," as Congress intended. Congress believed that such deployment would occur most rapidly if the Commission used its authority to remove regulatory "barriers to infrastructure investment." The Commission has an opportunity to further the process of removing those barriers in this proceeding, by adopting a regulatory policy that allows ILECs to compete freely and equally with its advanced services competitors. Just as competition drove the investment in technology that helped create the advanced services market, competition will ensure that it continues to flourish. More intense regulation, as proposed in the *Notice*, will stifle competition and investment. The losers will be consumers and the American economy.

Respectfully submitted,



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